New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 254—NO. 5
THURSDAY, JULY 9, 2015

WHITE-COLLAR CRIME

Expert Analysis

Prosecution of Conduct Abroad—Where Are the Limits?

By **Elkan Abramowitz**

And **Jonathan Sack**

As our economy has become more global in scope, so have the investigation and prosecution of white-collar crimes. Hardly a week goes by without reports of the Department of Justice or Securities and Exchange Commission taking action based on conduct that occurred beyond our borders—the charging of a British trader for allegedly causing the 2010 "flash crash" in U.S. securities markets[1] and the indictment of FIFA officials for widespread corruption[2] being two of the more recent high-profile instances.

The prosecution of individuals for actions abroad gives rise to two threshold issues—the "extraterritorial" application of federal criminal law and "sufficient nexus" between the defendant and the United States. The two issues touch on similar concerns but are distinct, as thoughtfully explained recently by Southern District of New York U.S. Magistrate Judge James C. Francis IV, in *United States v. Hayes*.[3]

Extraterritoriality concerns whether a statute applies to foreign conduct and is a question of statutory interpretation. Nexus concerns whether acts that occur abroad have sufficient connection with the United States such that prosecution of individuals for the acts is fair and consistent with due process. The distinction was articulated by Magistrate Judge Francis in these terms:

> [t]he statutory interpretation involved in determining if a statute is or is not extraterritorial reveals nothing (or, at best, very little) about whether a particular prosecution comports with the Fifth Amendment. Thus, in a situation like this, where a criminal statute is applied domestically but the defendant claims insufficient connections with the United States, a court should evaluate whether the prosecution is fundamentally fair.[4]

In this framework, even when a criminal statute does not have extraterritorial application, acts that occur abroad may give rise to prosecution of an individual in this country when the acts have sufficient ties to this country, for example, when a scheme relies on interstate wire transmissions or the U.S. mails, or the acts have a "substantial intended effect" in the United States.[5]

While dismissals of prosecutions for lack of sufficient nexus have been "exceedingly rare,"[6] due process imposes genuine limits on the reach of federal prosecutions, as explained recently by U.S. District Judge Charles R. Breyer, Northern District of California, in dismissing the prosecution in *United States v. Sidorenko*.[7] In that case, the defendants were charged with corrupt acts in Canada related to the operation of a United Nations agency based in Canada.

Below we discuss the holding in *Sidorenko* and briefly contrast it with the decision in *Hayes*, in which the court declined to dismiss charges against a defendant who was accused of manipulating the London Interbank Offered Rate (LIBOR)—the benchmark interest rate—for loans denominated in Japanese Yen while he was working abroad for a global financial institution. These cases suggest the broad, but not unlimited, reach of federal criminal prosecution.

'United States v. Sidorenko'

The Sidorenko prosecution involves the application of the honest services fraud and federal funds bribery statutes to what Judge Breyer described as conduct that "occurred outside of the United States between three defendants who are not United States citizens, who

ELKAN ABRAMOWITZ *and* JONATHAN SACK *are members of Morvillo Abramowitz Grand Iason & Anello P.C.*. GRETCHAN R. OHLIG, *an attorney, assisted in the preparation of this article.*

never worked in the United States, and whose use of the wires did not reach or pass through the United States."[8]

Defendant Mauricio Siciliano, a Venezuelan national, lived and worked in Montreal, Canada, for the International Civil Aviation Organization, a United Nations specialized agency, in the agency's ICAO's Machine Readable Travel Documents Programme, a department that promulgated standards and best practices for machine-readable passports and travel documents. Defendants Yuri Sidorenko and Alexander Vassiliev were the chairmen of the EDAPS Consortium, a Ukrainian conglomerate of companies that manufactured and supplied security and identity products. Sidorenko was a citizen of the Ukraine, Switzerland and St. Kitts & Nevis. Vassiliev was a citizen of the Ukraine and St. Kitts & Nevis. Both men resided in Dubai.

According to the indictment, from 2005 to 2010, Sidorenko and Vassiliev provided money and other things of value to Siciliano in exchange for Siciliano using his position at ICAO to benefit EDAPS and Sidorenko and Vassiliev personally. For instance, Siciliano allegedly introduced and publicized EDAPS to government officials and entities, arranged for EDAPS to appear at ICAO conferences and endorsed the Ukranian conglomerate to other organizations and business contacts. Siciliano also allegedly helped Vassiliev's girlfriend obtain a visa to travel to Canada. In exchange, Sidorenko and Vassiliev wired funds to a Swiss bank account held by Siciliano. Siciliano's son also worked for Sidorenko in Dubai.

Siciliano and Vassiliev[9] moved to dismiss the charges, arguing in part that the indictment failed to state an offense because the wire fraud and bribery charges do not apply extraterritorially and because the government had failed to allege a sufficient nexus between the defendants and the United States as required by the Due Process Clause. On the first issue, the court, following *Morrison v. National Australia Bank*,[10] and cases applying *Morrison*, held that neither the wire fraud nor federal funds bribery statutes at issue have extraterritorial reach.

> Even when a criminal statute does not have extraterritorial application, acts that occur abroad may give rise to prosecution.

The court then considered the issue of sufficient nexus, that is, whether the court could properly exercise jurisdiction over the defendants for their conduct abroad. The government argued a sufficient nexus on two grounds: first, that "the aim of [the illegal] activity [was] to cause harm inside the United States," and, second, that the United States had a financial interest on account of its millions of dollars of annual contributions to the ICAO.

The indictment alleged, specifically, that the United States contributed approximately 25 percent of the ICAO's annual budget, which was about $64 million.[11] As the government contended, the defendants "corrupted ICAO, an international organization in which the United States was a seminal member, to which the United States contributed millions of dollars each year that…amounted to roughly 25% of ICAO's budget, and that implicated national security because ICAO set standards for international travel documents."[12]

The court rejected these arguments and held that the link to the United States was too tenuous, noting that the government had not alleged that the funds contributed by the United States were adversely affected in any way by the alleged wrongdoing. Nor did the court find any allegations in the indictment to support the notion that the defendants knew that the alleged illegal activity involved the United States, let alone intended to harm the United States.[13]

In terms of nexus grounded in a national interest, the court wrote, "[i]f everything that had an impact on national security gave the United States the right to drag foreign individuals into court in this country, the minimum contacts requirement would be meaningless." While sending money to the ICAO "probably increases the contacts that the United States has with the ICAO[,]…it is difficult to see how it results in adequate contacts with Siciliano, who neither lived in, worked in, nor directed any of his alleged conduct at the United States, let alone Sidorenko or Vassiliev, who did not even work for the ICAO."[14]

Breyer observed that "under the government's theory, there is no limit to the United States's ability to police foreign individuals, in foreign governments or in foreign organizations, on matters completely unrelated to the United States's investment, so long as the foreign governments or organizations receive at least $10,000 of federal funding. This is not sound foreign policy, it is not a wise use of scarce federal resources, and it is not, in the Court's view, the law."[15] The government has appealed Judge Breyer's order dismissing the indictment.

'United States v. Hayes'

The court in *United States v. Hayes*, like the court in *Sidorenko*, held that the wire fraud statute did not have extraterritorial intent or application, but reached a different conclusion as to nexus of the defendant with the United States.

The defendants, Tom Alexander, William Hayes and Roger Darin, were charged with conspiring to commit wire fraud by manipulating the LIBOR for Yen. Both defendants worked at UBS

and traded in short-term interest rates. Hayes was a senior Yen swaps trader in Tokyo; Darin was a trader in Singapore, Tokyo and Zurich, and had supervisory responsibility for the bank's Yen LIBOR submissions to the British Bankers' Association (BBA), which administered the LIBOR for Yen.

fraudulent scheme. Specifically, the complaint alleged that the defendants had caused the manipulated LIBOR to be published to servers in the United States and used U.S. wires to memorialize trades affected by the rate. As a consequence, "[t]he culpable conduct underlying the substantive count… occurred in the United States."[16]

In terms of nexus grounded in a national interest, the court in 'Sidorenko' wrote, "[i]f everything that had an impact on national security gave the United States the right to drag foreign individuals into court in this country, the minimum contacts requirement would be meaningless."

According to the criminal complaint, the defendants conspired to manipulate the Yen LIBOR by submitting false and misleading information to the BBA to increase the profitability of UBS's trading positions to the detriment of its counterparties. Darin, a Swiss citizen living in Switzerland, sought to dismiss the complaint, arguing that it involved an unauthorized extraterritorial use of the federal wire fraud statutes and violated his Fifth Amendment right to Due Process.

Magistrate Judge Francis initially considered a claim that the charges should be dismissed because of improper extraterritorial application of federal law. He agreed that the wire fraud statute did not have extraterritorial reach but rejected the defendant's claim because, in the court's view, the wire fraud statute was not being applied extraterritorially. Rather, the law was being applied to domestic conduct.

Unlike the court in *Sidorenko*, Francis found alleged acts in and affecting the United States that connected the alleged criminal conduct to this country, namely, the defendants' use of wire transmissions in the United States in furtherance of the charged

Magistrate Judge Francis then turned to the related question of whether Darin personally had sufficient nexus with the United States, noting that even when a criminal statute is appropriately applied domestically, the court still must have jurisdiction over a particular defendant. He found that the government had sufficiently alleged such a nexus insofar as Darin had been aware that the Yen LIBOR was published in the United States, and an inference could be drawn that he was aware that trades would likely impact U.S. counterparties, particularly in New York. In so finding, the court rejected Darin's contention that, for this conduct to have sufficient nexus with the United States, he must have intended to cause harm in the United States or to U.S. citizens.

Concluding that the statute had not been applied extraterritorially and that the prosecution was not arbitrary or fundamentally unfair, the court denied Darin's motion to dismiss the criminal complaint.[17] Darin filed an objection to the Magistrate Judge's Order, which was heard by Southern District Judge Paul A. Crotty on June 23, 2015. As of this writing, Judge Crotty's decision is still pending.

Conclusion

We can expect the prosecution of crimes occurring in whole or in part abroad to continue and, if anything, increase along with the spread of global commerce and technology. An area of particular interest will be Foreign Corrupt Practices Act prosecutions, in which the government has asserted jurisdiction over foreign parties who pay or receive things of value in violation of U.S. law.[18] The Sidorenko and Hayes decisions provide insight into when criminal prosecutions may come within, and fall outside, established principles of fairness and due process. Ultimately, however wide the reach of federal criminal law, some prosecutions may extend too far beyond our borders.

1. Arun Viswanatha, Bradley Hope and Jenny Strasburg, "'Flash Crash' Charges Filed," The Wall Street Journal (April 21, 2015).
2. Press Release, "Nine FIFA Officials and Five Corporate Executives Indicted for Racketeering Conspiracy and Corruption," Department of Justice (May 27, 2015).
3. 12MJ3229 (S.D.N.Y.).
4. Memorandum and Order, *United States v. Hayes*, 12MJ3229 at p. 25 (S.D.N.Y. Mar. 20, 2015).
5. Id. at pp. 26-27.
6. Id. at p. 25.
7. ___ F. Supp.3d ___, 2015 WL 1814356 (N.D.Ca. April 21, 2015).
8. Id. at *2.
9. Sidorenko did not appear in the action.
10. 561 U.S. 247 (2010).
11. Indictment, *United States v. Sidorenko*, 14cr341 at ¶3 (June 26, 2014).
12. Government's Response to Defendants' Motion to Dismiss, *United States v. Vassiliev*, 14cr341 at p. 14 (April 1, 2015).
13. 2015 WL 1814356 at *7.
14. Id. at *8.
15. Id. at *6.
16. Memorandum and Order, *United States v. Hayes*, 12MJ3229 at p. 23.
17. Id. at pp. 24-26.
18. Drew Harker, "*US v. Vassiliev*—Some Foreign Bribery is Beyond US Reach," Law360.com (May 18, 2015).